P.B. & S. Chemical Company, Inc. *and* United Steelworkers of America, AFL–CIO. Case 25–CA–19855

November 23, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 21, 1990, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, P.B. & S. Chemical Company, Inc., Henderson, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent's exception that the General Counsel failed to establish a prima facie case is without merit. The judge neglected to cite *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983), in connection with his 8(a)(3) findings. Nevertheless, we find that with respect to the judge's findings and conclusions concerning Cosby Shelton's suspension and discharge, he set forth the General Counsel's prima facie case and the Respondent's failure to rebut it. Therefore, we find that the judge's discussion fully satisfies the analytical objectives of *Wright Line*. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Thus, the judge properly relied on evidence showing that other employees had not been disciplined for conduct similar to or worse than that engaged in by Shelton. We are convinced therefore, that in the absence of the Respondent's antiunion animus, the Respondent would not have discharged Shelton for his threats.

The Respondent's exception that the judge erroneously found that Cosby Shelton's unlawful discharge ''was necessarily based on the unlawful suspension'' also is without merit. We note the testimony of Respondent's vice president Harold Sasse who allegedly made the decision to discharge Shelton: ''There had been a threat made the day before, and there was another threat in front of three management people. And I thought that we had no alternative then but to make a decision . . . [to terminate Cosby Shelton].'' We therefore find no error in the judge's finding that the suspension (threat of the day before) and the discharge (threat in front of three management people) were linked. Moreover, the record supports the judge's finding that Cosby Shelton was both discriminatorily suspended and discharged with or without reliance on any connection between them.

Steve Robles, Esq., for the General Counsel.

David B. Sandler, Esq., of Louisville, Kentucky, for the Respondent.

Frank Pittman, of Lexington, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Henderson, Kentucky, on November 15, 1989. The complaint, as amended once during the hearing, alleges that Respondent violated Section 8(a)(1) of the Act by interrogating and threatening employees and Section 8(a)(3) and (1) of the Act by discriminatorily suspending and then discharging employee Cosby Shelton. The Respondent has filed an answer denying the essential allegations of the complaint. The parties have filed briefs which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTIONAL MATTERS

Respondent, a Kentucky corporation with an office and place of business in Henderson, Kentucky, is engaged in the manufacture, sale, and distribution of chemicals. During a representative 1-year period, Respondent purchased and received at its Henderson facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Kentucky. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

The Respondent's plant is comprised of three main buildings connected by walkways and docks. There are several departments: the shipping department and warehouse; the chlorine department; the acid department; and the solids department. There is also a maintenance garage in a separate building about 75 yards away from the main facility where most of the employees work.

In January 1989, the Union began an organizing campaign among the approximately 100 employees of the Respondent. In a January 19, 1989 letter to Respondent's president, Ray Preston, the Union listed seven members of its organizing committee. Included was the name of Cosby Shelton, the alleged discriminatee in this case.[1]

Shelton, who worked in the chlorine department on the day shift, was an open and active union adherent. He wore a union button to work, attended union meetings, and distributed union cards and leaflets to other employees.

[1] An election petition was filed and a Board election was scheduled for December 7, 1989.

2. Interrogations and threat

Uncontradicted testimony establishes that, on one occasion in late January or early February 1989, Plant Manager Bruce Williams approached Shelton at his work station and initiated a conversation about the Union. Williams asked why Shelton wanted a union and Shelton gave his reasons, basically concerns about money and seniority.

At or about the same time, although on a different day, Shelton was approached in the same manner by General Foreman Vernon Walker. Walker asked why the employees wanted a union. Shelton did not ''give him a whole lot of answers,'' but interrupted by saying, ''if they have a union vote and it don't get in, the ones that you all know are for it, you'll probably sort of be hard on them, won't you?'' Walker responded, ''we're not like that . . . because we could always set you up if we wanted to.''[2]

Employee Leslie Ervin testified about being approached by Williams at his work station on one occasion in February 1989. Williams asked Ervin, who was wearing a union button, about the turnout at a union meeting. Ervin said, ''I go to the union meetings, but I'm not giving any other names or any information.'' Williams testified that he could not recall, but could not deny the above conversation related by Ervin. I therefore credit Ervin's account.

Employee Matt Jarrett testified that, in February, he had a conversation about the Union on company property with Supervisors Ken Jones and Terry Schoonover who were close personal friends of his. At this point, however, they did not know Jarrett's position on the Union. They asked him how the Union was doing and how many people would sign union cards. Jarrett did not respond to the question about cards because he did not know the answer. The supervisors also asked if Jarrett had attended union meetings and he answered that he had attended one. They then asked how many people were present. Jarrett responded, ''roughly about nine or ten.''[3]

Jarrett also testified to a conversation with Schoonover and Jones in Schoonover's office shortly after Shelton was discharged. This would have been after March 24, 1989. Jarrett went to the office to borrow some chewing tobacco from Schoonover. While he was in the office, Jones and Schoonover, who were apparently having lunch, asked whether the Union would ''die out'' because Shelton—a leading union adherent—had been fired. Jarrett said he did not think it would.

Jones and Schoonover had difficulty recalling the above conversations, but they could not deny that the conversations had taken place as Jarrett testified. In these circumstances, I credit Jarrett's account of the conversations.

3. The Shelton-Woolfolk incident

While the Union's strength was apparently in the main building, the garage employees appeared to be against the Union. An antiunion leaflet was distributed which contained the names of a number of the garage employees, including David Woolfolk, who had a confrontation with Shelton on March 21, 1989, which led to Shelton's suspension and subsequent discharge. Woolfolk had worked with Shelton in the chlorine department before he was transferred to the garage in early 1989. The Respondent not only knew of Shelton's prounion position, but it also knew that Woolfolk and most of the garage employees were against the Union.

The altercation between Shelton and Woolfolk had its origins in prior conversations about the Union between Woolfolk and a prounion chlorine department employee, Claude Johnson. Johnson was trying to persuade Woolfolk to support the Union. One of these conversations took place earlier in the day on March 21.

On that day, March 21, during the afternoon break—which lasts from 2:30 to 2:40—Woolfolk and a group of about eight or nine garage employees took their break at the main building. This was unusual because they usually took their breaks at the garage. According to garage leadman Johnny Tapp, the reason the garage employees came to the main breakroom on this day was to ''find out'' about the Union. Before the garage employees left to go to the main building, Woolfolk mentioned to Tapp that he and Johnson ''had a few words or something over there.''

During the break, there was some discussion among the employees about the need for a union which led to some disagreements and, finally, to the confrontation between Woolfolk and Shelton. Several witnesses gave accounts of what followed, but the most complete account came from Shelton. Woolfolk did not testify although he was still employed by Respondent at the time of the hearing. Johnson provided some background information but he had left the breakroom before the confrontation between Woolfolk and Shelton. Employees Matt Jarrett and Tapp heard and saw some but not all the confrontation and employee Robert Gish and Supervisor Jimmy LaRue heard and saw only the tail end of it.

Employee Robert Gish testified that he overheard Shelton and Woolfolk arguing. Shelton told Woolfolk he would ''whip his ass'' and Woolfolk replied, ''that's all right by me.'' Supervisor LaRue testified that he overheard Shelton say the same thing and that Woolfolk said there would not be any fight. Neither Gish nor LaRue overheard what was said before Shelton's statement.

Tapp testified that he overheard Shelton interrupt a conversation between Woolfolk and Johnson by saying that Woolfolk would not have gotten his job in the garage if he was not a ''suck ass.'' He testified that Woolfolk and Shelton had words which he could not recount because he was not ''paying attention to them.'' Then he saw Shelton throw his hat on the table and say that he would ''whip [Woolfolk's] ass.'' Woolfolk said it did not matter to him, and Tapp stepped between them.

Jarrett testified that, during the discussion in the breakroom, Tapp told Shelton to tell Johnson not to harass Woolfolk any more. Shelton replied that Tapp should tell Johnson himself. An argument then ensued between Shelton and Woolfolk, but Jarrett did not hear ''what started the whole thing.'' He did hear Shelton say, ''if you want to talk about this, we can talk about it in the bathroom [or] outside the gate after work.'' Woolfolk responded, ''no, if we're going to talk about it, we'll talk about it right here.'' Shelton

[2] The above is based on Shelton's testimony. Walker did not deny questioning or talking to Shelton as he testified. Walker testified that he could not recall questioning Shelton or making the ''set you up'' remark. In these circumstances, I credit Shelton's account.

[3] Although on cross-examination Jarrett was asked about conversations concerning the Union with Jones and Schoonover at a bar or bars, I am convinced that these were different conversations from the one above on company property.

then said, ''okay,'' took off his glasses and hat and threw them down. Jarrett then grabbed Shelton.

Shelton testified that the garage employees were sitting together and he and several employees, including Jarrett and Johnson, were sitting at a nearby table. Shelton's group was talking about overtime and the need for a union. Tapp joined in this conversation briefly. Later, as Shelton was getting ready to leave, he passed by the table of the garage employees and glanced at Woolfolk. Woolfolk jumped up, waved his arms, and said, ''I don't want to hear nothing you got to say about the union.'' Shelton replied that he did not intend to say anything about the Union. Woolfolk and Shelton then started talking about how Woolfolk had gotten his job at the garage. Shelton said that maybe he had gotten it because his competitor for the position was not ''a suck ass.'' Woolfolk asked if Shelton was calling him ''one'' and Shelton said he was not. At this point, Woolfolk ''came toward Shelton and said, ''Let's go right here.'' At first Shelton said ''no,'' but when Woolfolk repeated the challenge Shelton took off his glasses and said, ''Okay, if you want to do that, do it.'' Tapp then stopped Woolfolk and Jarrett stopped Shelton.

Although it is difficult to determine exactly what happened in the breakroom on March 21 and what words were spoken, it is clear to me that Woolfolk threatened to fight Shelton prior to any alleged threat by Shelton. This is supported by Shelton's uncontradicted testimony because Woolfolk did not testify and none of the other witnesses heard the entire conversation. Moreover, Shelton's testimony in this respect is supported by the written statement he submitted to the Respondent the next day.

As for Shelton's alleged threat, I cannot determine exactly what words he used. I find, however, that Shelton responded to Woolfolk's threat to fight by agreeing or threatening also to fight. Although three of the witnesses attributed the same specific statement to Shelton, and I believe that Shelton said something like that, their testimony as to Woolfolk's retort does not make sense. I think it improbable that Woolfolk would have responded to a threat by Shelton to ''whip his ass'' by saying there would be no fight, that it was ''all right,'' or that it did not matter. Nor is Jarrett's version, that the two simply stated their desire to ''talk'' to one another, plausible. Shelton's version—that Woolfolk said ''let's go'' and that he agreed and took off his glasses—seems closest to the truth. Whatever words were spoken Shelton simply responded to a threat to fight by making one of his own.

Accordingly, I find that Shelton and Woolfolk had an argument which had at least something to do with their divergent positions on the union campaign. Shelton was in favor of the Union and Woolfolk was against it. In the course of their argument Woolfolk threatened to fight Shelton and Shelton responded in kind. This is not a situation where one employee threatened another without provocation or without response. Each threatened to fight the other.

4. The suspension of Shelton

After the incident, Shelton spoke to Johnson and told him what had happened, including Tapp's statement that Johnson should stay away from Woolfolk. Thereafter, both Johnson and Shelton reported the incident to Mike Mellis, their supervisor. Mellis suggested that they all go see Foreman Walker which they did.

Walker testified that Robert Gish and LaRue were the first people to report the breakroom incident to him. They told him that Shelton threatened ''to whip [Woolfolk's] ass.'' Shortly thereafter, according to Walker, Woolfolk, Tapp, and another employee also came in to report the same thing. When these employees left, Walker called Plant Manager Williams and told him about the reports.

Immediately after Walker finished talking to Williams, Supervisor Mike Mellis came into Walker's office with Shelton and Johnson. According to Walker, Shelton said that Woolfolk had threatened *him*. Johnson confirmed in his testimony that Shelton told Walker that Woolfolk was ''jumping up in his face and threatening . . . and acting like he wanted to fight.'' Walker stopped Shelton, stated that he had previous reports about the incident, and suggested that the three of them go see Williams in his office.

Uncontradicted testimony from Shelton and Johnson establishes that, while they and Mellis were walking to Williams' office, some distance away, Shelton asked Mellis what would happen if Woolfolk ''jumped'' on him outside the plant and a fight ensued. Mellis replied that, if they were off company property, it would be ''all right'' for them to fight. Mellis, who is still employed by Respondent in a corporate capacity, did not testify.[4]

When Shelton, Mellis, and Johnson arrived at Williams' office, Shelton told Williams his version of what had happened and also stated that he felt that he had been ''set up.'' Williams replied that he did not think so, but that if he had been set up, Shelton ''fell for it.'' Williams then dismissed Mellis and Johnson and spoke to Shelton alone.

Williams told Shelton that he was suspended pending further investigation. He also asked Shelton to prepare and submit a written statement of his account of the incident. Shelton protested that Woolfolk was not also being suspended. Williams replied that Woolfolk had witnesses, to which Shelton replied that he also had a witness, Matt Jarrett. Shelton asked that Williams call his witness, but Williams declined because he said it was too late in the day.[5]

Williams testified that he directed a further investigation by Walker, including the gathering of written statements from witnesses. Walker began the process at the end of the day on March 21. The Respondent does not have a policy of obtaining written statements from employees before final discipline is imposed. But, according to Williams, written statements were secured in this case, because Shelton was ''actively involved in the union organizational activity,'' and

[4] I credit the above-uncontradicted testimony. Respondent alleges that it should be rejected because neither Johnson nor Shelton had included this exchange in their pretrial affidavits taken by the Board agent who interviewed them during the investigation of this case. I do not view such omission as a reason to impugn their testimony in the circumstances of this case. Johnson testified that the matter did not come up during the pretrial interview. An employee does not have control over what is asked in such interviews. Moreover, Mellis' response as related by the uncontradicted testimony is consistent with Respondent's rules which prohibit fighting only on company property. Accordingly, in the absence of a direct contradiction in the affidavits, I consider far more significant the failure of Respondent to call Mellis to rebut the live testimony before me.

[5] The above is based on Shelton's detailed and essentially uncontroverted testimony. Johnson corroborated Shelton on the first part of the meeting. Williams did not testify in any specific way about the conversation in his office except to indicate that he did notify Shelton about his suspension and asked Shelton to submit a written statement. Williams also testified that he told Shelton he would be in touch with Shelton the next day.

Respondent wanted to be ''doubly cautious to not do anything that would jeopardize our position.''

By the next morning, March 22, Walker had received statements from about five or six employees and passed them along to Williams ''early that morning.''

Employee Matt Jarrett met with Williams and Walker at about 8 a.m. on March 22. He presented them with his statement and they read it. The statement confirms Jarrett's testimony in this case about the breakroom incident and says that Shelton never threatened Woolfolk. It also states that Jarrett doubts Williams will believe him and Shelton and cautions Williams not to be influenced by Shelton's union activity.

Williams asked Jarrett if he actually heard a threat and Jarrett said he did not. Jarrett then compared the Shelton-Woolfolk incident with another incident involving Johnson and Schoonover which Jarrett considered threatening and which had gone unpunished even though Williams had overheard it. Williams replied that he remembered the incident but that he did not know exactly what was said because his hearing was bad.[6]

Williams testified that the information he received as a result of the investigation indicated that Woolfolk ''had exercised poor judgment in the case'' and that ''maybe [Shelton] wasn't totally at fault.'' Nevertheless, at this point, according to Williams, no decision had been made to discipline Woolfolk. Woolfolk was not consulted during the investigation even though he was at work on March 22.

5. The discharge of Shelton

At about 1 p.m. on March 22, Shelton arrived at the plant with his written statement. In the statement, which essentially confirms his testimony about the incident, Shelton asks why only he, and not Woolfolk, should be suspended, why garage employees who ''claim to be anti-union'' should be believed, and why his witness was not questioned. Shelton also claimed he was ''set up'' because of his union activities and asked that he and Woolfolk be treated equally and ''not as a company man and a union man.''

When Shelton arrived at the plant, Williams was meeting with Vice President Harold Sasse and Foreman Walker. Williams invited Shelton to join them. Shelton protested his suspension and Williams responded. An argument ensued between Williams and Shelton. Shelton at some point expressed his frustration and said he thought he was fired. Sasse stated that the investigation was not complete and Shelton ended the meeting by saying that he was going to see the Respondent's president, Ray Preston.

There is a critical conflict over what was said at one point during the argument between Shelton, on the one hand, and the three witnesses for the Respondent.

Shelton testified that he said, ''if David Woolfolk comes up to me out on the street and threaten[s] me like he did in the breakroom . . . it's going to be different because he can't hide behind y'all.'' On cross-examination, Shelton used the word ''confront'' rather than ''threaten,'' but he confirmed the substance of his testimony.

According to Williams, who could not recall everything ''in detail,'' Shelton said, ''if I catch David on the street I'm going to get him.'' Walker testified that Shelton stated, ''I didn't threaten Woolfolk, but when I catch him, I'll fix him.'' Sasse testified that he heard Shelton say, ''If I see him on the street, I'll get him.''

In assessing all the testimony concerning the March 22 meeting, the reliability and demeanor of the witnesses, the completeness of their testimony, and the plausibilities of the situation, I find that Shelton did indeed state that he would ''get'' or ''fix'' Woolfolk if he ''caught'' him outside the plant. However, I also find that he prefaced this statement with the further statement, ''if [Woolfolk] threaten[s] me like he did in the breakroom.'' Thus, the statement that Shelton would ''get'' Woolfolk was conditional: if Woolfolk threatened Shelton again *and* if they were outside the plant, then Shelton would ''get'' or ''fix'' him. This version is consistent with the uncontradicted testimony that Woolfolk threatened Shelton first, a position which Shelton consistently maintained in this proceeding. Indeed, Walker's account offers some support for this view because he testified that Shelton prefaced his alleged threat with the statement that he, Shelton, did not threaten Woolfolk. In contrast, the testimony of Respondent's witnesses that they viewed Shelton's remarks as a dischargeable offense at the time and decided to discharge him immediately after the March 22 meeting is not believable. Uncontradicted testimony shows that these officials did not show any alarm at the remarks when they were made and that, in a conversation with Shelton the next day, Williams stated that the investigation had not been completed. This supports the view that Shelton's remarks were more muted than the version reported by Respondent's witnesses.[7]

On Thursday, March 23, Shelton called Williams. Williams told Shelton that he had still not reached a decision on Shelton and told him to be in his office at 7:30 on Friday morning, March 24.[8]

On Friday morning, March 24, Shelton reported to Williams' office as requested. His supervisor, Mike Mellis, was also present. Shelton asked for an employee witness, Claude Johnson. Williams then asked Shelton to step out of the office while Williams checked with higher management. Shelton waited outside the office for 5 or 10 minutes. Williams then came outside and said that Shelton could not have a witness and, if he did not want to participate in the meeting without a witness, he should leave.[9]

Shelton left, went to his wife's office, and called Johnson at the plant. Johnson told Shelton that Williams had called a meeting of employees and told them that Shelton was fired.[10]

Shelton then returned to the plant and spoke to Williams. He told Williams that he ''didn't do it,'' but was there to

[6] The above is based on Jarrett's uncontradicted testimony which was not subjected to cross-examination. He also impressed me as a credible witness. I therefore credit his testimony.

[7] I do not believe that my finding is undercut by Respondent's argument that Shelton made an unconditional threat because he believed he was fired anyway and threw caution to the wind. Shelton may have thought things were stacked against him at the March 22 meeting, but he did not give up. It is uncontradicted that he told the management officials that he was going to carry his protest to Ray Preston, the Respondent's president, and that he did thereafter meet with Preston. Shelton also called Williams the next day, went to the plant on Friday, and asked for a witness to another meeting with Williams. These are not the actions and conduct of a person who does not have an interest in keeping his job.

[8] The above is based on Shelton's uncontradicted testimony.

[9] The above is based on Shelton's uncontradicted testimony.

[10] The above is based on Shelton's testimony which was corroborated in part by Johnson.

get his check and termination slip which Williams gave him.[11]

The employee meeting referred to above was conducted at about 10 minutes to 8 in the morning on Friday, March 24. According to Williams who conducted it, the meeting was held ''because feelings were running very high and the employees felt that [Shelton] was unjustifiably discharged because of the problem with David Woolfolk.'' Williams told the employees that Shelton had not been fired for his part in the breakroom incident because, after an investigation, Respondent found that Shelton ''may have been provoked.'' Williams did state that Shelton was in fact fired for making a threat against Woolfolk in the presence of three management officials. In response to a question from employee Jarrett as to whether Woolfolk had been disciplined, Williams answered, ''no, not yet.''

The next Monday, March 27, Walker notified Woolfolk that he was to receive a 1-day layoff for his part in the breakroom incident. The decision to discipline Woolfolk was apparently made at this time, after Walker and Williams had spoken to him. According to Williams, the interview with Woolfolk indicated that Woolfolk ''hadn't maybe exercised the best judgment'' and the employee statements indicated ''some conflict.''

6. Other altercations and Respondent's reaction to them

The Respondent has rules of conduct which were allegedly followed in the discipline of Shelton and Woolfolk. Violation of some rules calls for a progressive discipline such as an oral reprimand for the first offense, a 1- or 3-day suspension for the second, and discharge for the third. Violation of other rules calls for immediate discharge for the first offense. Among the latter violations are ''threatening or intimidating other employees or supervisors'' and ''fighting or attempting to provoke a fight on company premises.'' No evidence of prior violations of these rules was submitted in this case, except for vague testimony from Williams to the effect that an unnamed employee was fired some years before for actually striking a fellow employee. There was evidence, however, concerning several incidents which arguably constituted violations of Respondent's rules and which went unpunished. The General Counsel argues that this evidence demonstrates the disparate treatment of Shelton because of his union activities. The Respondent disputes this contention. The evidence is as follows.

Uncontradicted testimony from employee Griggs Garrett establishes that, in the summer of 1987, he had an altercation with Supervisor Mike Mellis. After correcting Garrett, Mellis became upset because Garrett appeared to be smiling. Mellis ''got up in front of [Garrett's] face, and said . . . if you [don't] wipe that smile off your face, I'm going to knock your fucking head off.'' Mellis was not disciplined for this threat. He is still employed with Respondent, but he was not called as a witness in this case.

Even though Garrett did not immediately report the incident to higher authorities, both Walker and Williams learned of it. Walker testified that he heard about the threat from an employee in the same words described by Garrett above. He investigated the matter by talking to an alleged eyewitness, employee J. B. Oglesby, who told Walker that Mellis had simply told Garrett to ''wipe the damn smile off his face.'' Oglesby did not testify in this case and Walker never interviewed Mellis or Garrett about the incident. Walker apparently reported Oglesby's version to the person who complained to him and nothing further was done about the matter. Williams testified that he received a report from Walker on his investigation of the Mellis-Garrett incident. Walker was unsure about when all of the conversations he related occurred. However, it is clear that Garrett left Respondent's employ in February 1989.

Garrett also had a conversation about the Mellis threat with Williams at or about the time he quit in February 1989 and another conversation with Ken Kern in March 1989 when he sought reemployment. In the first conversation, Williams and Garrett discussed the Mellis threat and whether it had bothered Garrett. Williams said that Mellis should not have done what he did and that Respondent would make sure that it would not happen again. In the second conversation, Kern, who is not identified in the record, said that Respondent was not hiring at that time. The Mellis threat came up, and Kern said he did not consider Mellis' statement ''abnormal'' or even a threat. Garrett, who had related the exact words of the Mellis threat to Kern, disagreed.

Williams confirmed that he had a conversation with Garrett about the Mellis incident about 1 or 2 weeks after Garrett left. This would have been a few weeks before Shelton's discharge. Williams also confirmed that Garrett related the threat to him as he testified and he did not dispute saying that he did not think Mellis should have acted the way he did. Kern did not testify.[12]

In the summer of 1988, employee Claude Johnson had some difficulty with then leadman Terry Schoonover calling him names. At one point, Johnson had a confrontation about the matter with Schoonover in the breakroom. Johnson said that if this happened again he would ''mop the floor with his ass.'' According to Johnson, Williams was present and overheard this remark. Williams testified that he was present but did not overhear what had been said. According to Williams, he later heard that Schoonover had called Johnson a name and he told Schoonover to apologize to Johnson.

Shortly after Johnson's confrontation with Schoonover, Johnson spoke to Foreman Walker about the matter and said that, if Schoonover persisted, he, Johnson, would ''take his head off his shoulder.'' Walker cautioned Johnson to calm down and said that he would take care of the situation. This is based on Johnson's testimony which was not contradicted by Walker. Johnson was not disciplined for either statement.

Employee Ervin testified that, a few days before Shelton was suspended, he overheard an argument between employees Rick Gish and Dwayne Sutton in which Gish threatened that he would ''whip [Sutton's] ass'' in the plant, outside, or anywhere. Neither Rick Gish nor Sutton testified in this proceeding.

Shortly after Shelton was suspended, Ervin was working with Rick Gish when they were approached by Foreman

[11] The above is based on Shelton's uncontradicted testimony.

[12] The General Counsel's question to Garrett concerning the second conversation assumed that it was with Ken Curry who was identified elsewhere in the record as an administrative assistant to a vice president. However, Garrett's answer named Ken Kern as the other party to the conversation. Kern was never identified in the record. From the context of Garrett's testimony it appears that Kern, or whoever it was, had some kind of authority to interview and hire employees.

Walker. Walker asked them if they had any questions about what had happened to Shelton. Gish said that just a few days before he had threatened Sutton, as related above. Walker, who knew about the incident, responded, ''You didn't mean it. You were just pissed off.'' Gish was not disciplined.[13]

B. *Discussion and Analysis*

1. The 8(a)(1) violations

The complaint alleges that Respondent violated Section 8(a)(1) of the Act when Williams interrogated Shelton and Ervin on separate occasions, when Walker interrogated Shelton and threatened him with reprisals, and when, on two occasions, Jones and Schoonover interrogated Jarrett. I find violations in all instances except Williams' questioning of Shelton.

The alleged Williams-Shelton interrogation involved a single question by Williams of Shelton at the latter's work station. Williams asked why Shelton, an open and known union supporter and a member of the Union's organizing committee, wanted a union. Even though there was no legitimate reason for the question and no assurances against reprisal, Shelton freely responded to the question and Williams did not persist. In all the circumstances, I do not believe that this single incident was coercive.

Walker's questioning of Shelton is different. Walker initiated a discussion about the Union by approaching and questioning Shelton. There was no reason for the question which was broadly framed and no assurances given against reprisals. Shelton did not respond directly to the question but he did express his concern about possible reprisals against union supporters. This led to a threat which coated the original question with coercion. Walker stated that Respondent ''was not like that . . . because we could always set you up if we wanted to.'' The implication of Walker's remarks was that Respondent would retaliate against union supporters, albeit in a subtle rather than a direct manner. Such subtle means of retaliation are every bit as coercive as more direct means. As courts have recognized, ''[t]oday the employer seldom engages in crude, flagrant derelictions. Nowadays it is usually a case of more subtlety, perhaps the more effective, and certainly the more likely to escape legal condemnation.'' *NLRB v. Bliss & Laughlin Steel Co*., 754 F.2d 229, 235 (7th Cir. 1985).

In these circumstances, I find that Walker's comments amounted to a coercive interrogation and an unlawful threat of retaliation in violation of Section 8(a)(1) of the Act.

Williams' interrogation of Ervin was likewise unlawful. Although Ervin was wearing a union button, Williams' question went beyond simply probing the strength of Ervin's position on the Union and asked about attendance at union meetings. The coerciveness of the question is shown by Ervin's reluctance and indeed refusal to answer it. Ervin was not a union committee member, as was Shelton, and Williams was a high management official who initiated the inquiry about union meetings. Williams gave no reason for the question and no assurances against reprisals. In all the circumstances, I find that this questioning was coercive and violative of the Act.[14]

Jarrett was questioned twice about union activities. In the first conversation, at the plant, Supervisors Jones and Schoonover asked Jarrett a series of questions which went well beyond mere curiosity about his position. They sought to probe the Union's strength by asking how many people had signed cards and attended meetings. Jarrett's position on the Union was unknown at this point. No reason for the questioning was offered, and the questioners gave no assurances against reprisals. Even though Jones and Schoonover were low-level supervisors and they were friends of Jarrett, the persistence of the questioning and the fact that Jarrett's position on the Union was unknown support my finding that the questioning was coercive. I am reinforced in this view after considering Jarrett's testimony concerning his somewhat strict, layman's definition of coercion, which, of course, would not bind me or the Board in any event. What is significant is the tendency of questioning to coerce as an objective matter, not whether an employee was actually coerced. See *NLRB v. Electric Steam Radiator Corp*., 321 F.2d 733, 736 (6th Cir. 1963); *Southwire Co*., 282 NLRB 916 (1987).

Also violative of the Act was the questioning of Jarrett in Schoonover's office after Shelton's discharge. Although here again the atmosphere was friendly, the context of the questioning was coercive. Thus, Jarrett was asked if the Union would ''die'' because Shelton, one of its leaders, had been fired. Many of the employees believed that Shelton had been treated unfairly. They all knew of his prominence in the union campaign. The coupling of Shelton's discharge and the future of the Union in the question to Jarrett gave the impression that there was some connection between Shelton's discharge and his union activities. Even though Jarrett thought the Union would not ''die'' due to Shelton's discharge, the implication was that Respondent hoped that this would be the case. Accordingly, in all the circumstances, including the prior coercive interrogation of Jarrett, I find that this questioning also had the tendency to coerce.

2. The suspension and discharge of Shelton

Respondent's suspension of Shelton in the midst of a union campaign of which he was a known leader was discriminatory. Woolfolk, who was not suspended, was a known antiunion, company adherent, as were the other garage employees who supported his version of the confrontation between him and Shelton. The Woolfolk-Shelton confrontation was occasioned, in part, by their differing views on the union question. The dispute led to threats to fight by both employees, but Woolfolk made the first threat. Yet, not only was Woolfolk not suspended, but he was not even interviewed until after Shelton had been discharged. At that point, as an afterthought and in order to lend the Shelton suspension and discharge some legitimacy, Woolfolk was given a 1-day layoff for his part in the confrontation.

When it suspended Shelton but not Woolfolk, Respondent was aware that union considerations warranted ''caution,'' as Plant Manager Williams testified. It suspended the prounion

[13] Walker did not contradict Ervin's testimony set forth above, although he did testify that he learned of the Gish-Sutton confrontation when they reported it to him the day after it happened. According to Walker, they reported to him that they had patched up their differences so he just ''let it go.''

[14] Contrary to Respondent's contention this allegation—added by amendment to the complaint—was closely related to other allegations in the original complaint which included unlawful interrogation by other supervisory personnel.

employee and retained the antiunion employee while it took the unprecedented step of gathering written statements from witnesses. Respondent's concern about and opposition to the Union is clear. Not only did Respondent's officials coercively question employees about the Union, but one threatened subtle retaliation against union supporters. This threat was made to Shelton and it proved prophetic. Even after the discharge, supervisors speculated that Respondent had killed the Union with Shelton's discharge. Thus, Shelton's suspension occurred in the context of Respondent's opposition to the Union and a particular focus on Shelton himself.

The circumstances of the suspension strongly support the finding of discrimination. Although an early report from antiunion garage employees blamed Shelton for threatening Woolfolk, within minutes, and certainly before suspending Shelton, Williams had direct evidence from Shelton himself that Woolfolk, and not Shelton, was at fault. In fact, the only person Williams talked with before suspending Shelton was Shelton himself. Williams did not talk with Woolfolk or any of the other alleged witnesses. Thus, Williams relied on hearsay reports of antiunion employees rather than the direct evidence of a union adherent and a participant in the confrontation. Williams even refused to talk with Shelton's proffered witness before suspending him. Woolfolk was not penalized until nearly 1 week later. This blatant discrimination, in the context of Respondent's opposition to the Union, establishes that Shelton's union activities provided a reason for his precipitous suspension.

The other examples of threats and near fights in this record show that Respondent tolerated and excused conduct even more serious than Shelton's. This evidence of disparate treatment offers further support for the finding of discrimination. Most comparable to the suspension here is the evidence concerning the Garrett-Mellis confrontation. There, as here, initial reports showed that Mellis made a specific threat against Garrett. Mellis' threat was a one-way threat because he completely intimidated Garrett who made no response or attempt to defend himself by words or deed. There was no suspension pending investigation. Indeed, there was no investigation at all since Walker did not talk to either participant. He merely talked to someone who had been suggested as an eyewitness. Walker took the alleged eyewitness' word that no threat was uttered and dropped the matter. More importantly, a supervisor made this threat, thus indicating Respondent's tolerance for rough language. Moreover, both Williams and Walker were present on separate occasions when employee Johnson threatened to strike then leadman Terry Schoonover. Although Williams claimed not to hear the threat, he did not initiate an investigation or suspend anyone pending investigation, even though he clearly knew about the confrontation when it took place. Walker actually heard Johnson's threat made in his presence. Other evidence also supports the finding, which I make, that threats of fights or bodily harm were not viewed as disciplinary events unless the employees actually came to blows. Nor had Respondent ever before suspended only one of two participants in a confrontation pending a full investigation which included gathering written statements.

Respondent's explanation for the suspension of Shelton and the nonsuspension of Woolfolk does not withstand scrutiny. Williams, who made the decision to and actually did suspend Shelton, testified that, at the time, he had information that Shelton had threatened Woolfolk but no information that Woolfolk had threatened Shelton or that Woolfolk was otherwise at fault. This is demonstrably false since he had such information directly from Shelton, together with a statement that Shelton had a witness. No other reason was offered in this record as to why Shelton was suspended and Woolfolk was not suspended. Williams did indicate that he did not talk to Woolfolk or other witnesses because it was late in the day so ''we couldn't get any confirmation one way or the other.'' However, this provides an even stronger reason not to suspend the prounion participant and retain the antiunion participant in a confrontation which had union overtones and touched Respondent's sensitivities on that score. The question is not whether a fuller investigation was warranted—as certainly it was—but why only Shelton was suspended on the information available. Respondent has failed completely to show that it would have suspended Shelton even in the absence of his union activities.

In the face of the unlawful suspension of Shelton, I am convinced that the same discrimination caused Shelton's discharge a few days later. During the investigation of the suspension, Respondent was alerted by both Shelton and Jarrett to the inequity of the suspension because of union considerations. Sasse, who made the decision to fire Shelton, admittedly considered the sensitivity of firing a union leader during the campaign, but his decision to discharge Shelton was also allegedly based on his view that Shelton made two threats. Thus, his decision was necessarily based on the unlawful suspension. Moreover, the second alleged threat was not a threat at all, and, if it was, it was a conditional threat which was not the subject of a disciplinary rule. Thus, while Respondent's rules prohibit ''fighting or attempting to provoke a fight on company premises,'' they do not prohibit such activity off company premises. This interpretation was in effect endorsed by Supervisor Mellis in a conversation with Johnson and Shelton a few days before the discharge. Nor was Shelton's statement violative of the rule against threatening or intimidating employees. It was not made in the presence of Woolfolk and was prefaced by the condition that Woolfolk threaten Shelton.

In any event, Respondent does not escape the inference of discrimination even under its version of Shelton's March 22 statement. The discharge was still infused with the taint of the unlawful suspension. Indeed, in view of other unpunished, more serious statements made by other employees in the presence of a supervisor but not in the presence of an employee, I doubt whether Shelton's statement that he would ''get'' or ''fix'' Woolfolk if he ''caught'' him on the street is even a threat under Respondent's rules. Johnson made a much more serious statement—to take Schoonover's head off—in Walker's presence and nothing was done about it. This was the second time Johnson had threaten to do something to Schoonover and there was no statement that Johnson would do what he threatened outside the plant.

That Shelton's statement, free of union considerations, would not have been considered a serious matter warranting discipline is shown not only by the evidence of Respondent's tolerance of even more serious threats, but also by Respondent's failure to immediately condemn it. Thus, when the statement was made in the presence of three management officials, Shelton was not immediately fired as the disciplinary rules provide. Nor did the officials tell Shelton that he had

said or done something wrong. They waited 2 days before discharging him and then took the unusual step of announcing the discharge to assembled employees before telling Shelton. Indeed, Shelton had every reason to believe that Respondent was simply investigating the initial breakroom incident because, when he called Williams the day after the alleged second threat, Williams said nothing about it and stated that the investigation had not been completed. This uncontradicted testimony refutes Respondent's contention that its officials had decided, immediately after the March 22 meeting, that Shelton had made an unprovoked threat which required his discharge. The contrary is true. Respondent did not think that anything Shelton said in the March 22 meeting was a dischargeable offense. This view is also consistent with its lenient treatment of other employees who had uttered threats and near threats and with its belated attempt to punish Woolfolk to make Shelton's discharge appear legitimate. When it became clear to Respondent that its investigation of the breakroom incident would not provide a legitimate basis for Shelton's discharge, it took 2 days to try to establish a better reason, which in my view was as pretextual as the reason for his original suspension.

In these circumstances, I find that the General Counsel has established that Respondent's discharge of Shelton was discriminatory and that Respondent would not have discharged him but for his union activities.

CONCLUSIONS OF LAW

1. By interrogating employees about their union activities and by threatening reprisals against employees for supporting a union, the Respondent violated Section 8(a)(1) of the Act.
2. By discriminatorily suspending and discharging employee Cosby Shelton because of his union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.
3. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall also recommend that the Respondent be ordered to offer reinstatement to employee Shelton, to remove from his record any notations relating to his discriminatory suspension and discharge, and to make him whole for any loss of wages or benefits he may have suffered due to the unlawful action taken against him, in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, P.B. & S. Chemical Company, Inc., Henderson, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about union activities.

(b) Threatening employees that there will or may be reprisals against them if they support a union.

(c) Discriminatorily suspending, discharging, or otherwise retaliating against employees because of their union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employee Cosby Shelton immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and benefits he may have suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Remove from its files any reference to the suspension and discharge of Cosby Shelton and notify him that this has been done and that evidence of his unlawful suspension and discharge will not be used as a basis for future personnel actions against him.

(d) Post at its facility in Henderson, Kentucky, copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you regarding union activities.

WE WILL NOT threaten you that there will or may be reprisals if you support a union.

WE WILL NOT discriminatorily suspend, discharge, or otherwise retaliate against you because of your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your Section 7 rights.

WE WILL offer Cosby Shelton immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, and make him whole for any loss of pay or benefits he may have suffered because of our discriminatory treatment of him, with interest.

WE WILL remove from our files any reference to Cosby Shelton's suspension and discharge and notify him that this has been done and that evidence of his suspension and discharge will not be used against him in the future.

P.B. & S. CHEMICAL COMPANY, INC.